

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEVIN EUGENE DAVIS,

Defendant-Appellant.

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UNPUBLISHED

June 27, 2006

No. 261987

Wayne Circuit Court

LC No. 04-011755-01

Before: Fort Hood, P.J., and Cavanagh and Servitto, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for receiving and concealing stolen property (motor vehicle), MCL 750.535(7), carrying a concealed weapon, MCL 750.227, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to concurrent terms of 32 months to 5 years imprisonment for the receiving and concealing stolen property and carrying a concealed weapon convictions, to be served consecutive to a two-year term of imprisonment for the felony-firearm conviction. Because defendant's constitutional rights were not violated, the prosecutor did not engage in misconduct, and the trial court did not err in failing to give a jury instruction regarding police testimony, we affirm defendant's convictions. The trial court did, however, abuse its discretion in exceeding the recommended sentencing guidelines without stating a compelling reason to do so on the record; we thus remand for resentencing.

On appeal, defendant first argues that he was denied his constitutional rights to due process and a fair trial by virtue of the prosecutor's eliciting testimony that defendant exercised his right to remain silent after his arrest. We disagree. This Court reviews preserved prosecutorial misconduct issues de novo to determine if the defendant was denied a fair and impartial trial. *People v Thomas*, 260 Mich App 450, 453; 678 NW2d 631 (2004). This Court also reviews issues of constitutional law de novo. *People v Hickman*, 470 Mich 602, 605; 684 NW2d 267 (2004).

Here, Officer Keith Dawson referenced defendant's post-arrest silence while testifying. The prosecutor asked Officer Dawson to tell her about his involvement in defendant's case. Officer Dawson responded, "I then went to the- - I believe he was housed at the 12<sup>th</sup> precinct. And I just took a interrogation, and I gave him his Constitutional rights, where he refused to make any statements." Officer Dawson's reference about defendant's post-arrest silence was not improperly elicited by the prosecutor, but rather, was an improper response to a proper question

to ascertain the events that transpired. *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999). Defendant does not dispute that this was a proper line of questioning, and there is no indication the prosecutor expected the improper response.

Moreover, while it is true that it is improper to directly or indirectly restrict the exercise of a defendant's constitutional right to remain silent, defendant has failed to show that the prosecutor's actions/officer's testimony denied him his constitutional right. That defendant did not make a statement was never repeated and defendant was provided the opportunity for a curative instruction, although he declined this opportunity. There is no indication the prosecutor impermissibly used defendant's silence against him in this case on the basis of that one question. Further, here was significant evidence first placing defendant inside a stolen vehicle, then involved in a foot chase where defendant was then apprehended and found to be carrying a concealed weapon. Even if the question was improper, then, it did not constitute plain error affecting his substantial rights, i.e., it was not outcome-determinative. See *People v McNally*, 470 Mich 1, 7; 679 NW2d 301 (2004).

Defendant next argues that the prosecutor committed misconduct and denied him a fair trial when she forced him to comment on the police officers' credibility, then continued to vouch for the credibility of the police officers in her closing argument by discussing the penalties that the officers would face if they did not testify truthfully. We disagree.

Issues of prosecutorial misconduct are considered "on a case-by-case basis by examining the record and evaluating the remarks in context, and in light of defendant's arguments." *Thomas, supra*, p 454. "The test for prosecutorial misconduct is whether, after examining the prosecutor's statements and actions in context, the defendant was denied a fair and impartial trial." *People v Hill*, 257 Mich App 126, 135; 667 NW2d 78 (2003). Where issues of prosecutorial misconduct are not preserved, this Court reviews the record for plain error affecting substantial rights, and will only reverse if the "error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of defendant's innocence." *People v Ackerman*, 257 Mich App 434, 448-449; 669 NW2d 818 (2003), citing *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

It is well settled that a prosecutor is "given great latitude to argue the evidence and all inferences relating to his theory of the case." *Thomas, supra*, p 456. However, a prosecutor may not appeal to the jury's civic duty by injecting issues broader than guilt and innocence or encouraging jurors to suspend their powers of judgment. *Thomas, supra*, pp 455-456. It is also improper for a prosecutor to "vouch for the credibility of his witnesses to the effect that he has some special knowledge concerning a witness' truthfulness." *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). The propriety of a prosecutor's remarks is dependent upon all of the facts of the case. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002).

In this matter, the prosecutor's cross-examination questions were not improper and did not improperly force defendant to comment on the credibility of the prosecution's witnesses. A witness may be cross-examined "on any matter relevant to any issue in the case, including credibility." *People v Layher*, 464 Mich 756, 764; 631 NW2d 281 (2001). Defendant's theory of the case was that he was not in the stolen vehicle and that the police officers lied about his involvement in the crimes charged. The prosecutor questioned defendant about whether the

police officers knew him personally and whether they had motive to fabricate the charges against him. While it is true that a prosecutor “may not ask a defendant to comment on the credibility of prosecution witnesses because a defendant’s opinion of their credibility is not probative,” this is not the case here. *Ackerman, supra*, p 449. The prosecutor’s questioning was proper because it attacked defendant’s theory of the case and his credibility.

The prosecutor also did not improperly bolster the credibility of the prosecution’s witnesses during closing when she discussed the penalties that the officers’ would face if they did not testify truthfully. The closing argument at issue was not improper because the prosecutor did not vouch for the credibility of the police officers nor did she insinuate that she had some special knowledge concerning their truthfulness. *Bahoda, supra*, p 276. The prosecutor may argue the credibility of the witnesses during closing. *People v Stacy*, 193 Mich App 19, 36-37; 484 NW2d 675 (1992). A review of the prosecutor’s remarks in context reveals that she was not vouching for the officers’ credibility, but instead merely responding to defendant’s attack on the officers’ credibility and defendant’s theory that the charges against him were fabricated by the officers. The argument was not improper, and therefore, defendant’s claim that he was denied a fair trial is without merit.

Defendant next argues that the trial court abused its discretion when, in sentencing defendant, it exceeded the recommended guideline sentencing range by more than 21 months. We agree. In reviewing a departure from a sentencing guidelines range, we review the trial court’s factual determination on the existence of a particular factor for clear error, the court’s determination that the factor is objective and verifiable de novo as a matter of law, and the determination that the factor constituted substantial and compelling reasons for departure and the amount of the departure for an abuse of discretion. *People v Babcock*, 469 Mich 247, 264-265; 666 NW2d 231 (2003). An abuse of discretion exists when the sentence imposed is not within the range of principled outcomes. *Id.* at 269. In ascertaining whether the departure was proper, this Court must defer to the trial court’s direct knowledge of the facts and the familiarity of the offender. *Id.* at 270.

Under the sentencing guidelines act, MCL 769.31, *et seq.*, a trial court must impose a sentence within the guidelines range unless there is a “substantial and compelling” reason for the departure stated on the record. MCL 769.34(3); *Babcock, supra*, p 255-256. The substantial and compelling reason justifying a guidelines departure must be objective and verifiable, must keenly or irresistibly grab the Court’s attention, and must be of considerable worth in deciding the length of a sentence. *People v Solmonson*, 261 Mich App 657, 668; 683 NW2d 761 (2004). This Court has found that “a court may not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range, unless the court finds from the facts in the court record that the characteristic has been given inadequate or disproportionate weight.” MCL 769.34(3)(b); *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003).

There is some dispute as to whether the trial court departed from the sentencing guidelines range by 21 months above the recommended range or, as argued by plaintiff, only 9 months (defendant was sentenced to 32 months to 5 years). Plaintiff did, at defendant’s sentencing, contend that the guidelines were incorrectly scored and noted that she not only recalculated the guidelines, but also discussed the same with defense counsel. According to plaintiff, the appropriate guidelines range should be 7 to 23 months imprisonment, rather than the

initial recommended range of 0 to 11 months. Defendant did not object to the rescoring. Regardless of the amount of the departure, however, this Court finds the trial court abused its discretion in exceeding the guidelines.

Before imposing sentence, the trial court addressed the many concerns it had with defendant's criminal behavior. The court noted that defendant had a bad criminal record and that defendant's criminal actions were repetitive and likely to continue. The trial court also noted that the guidelines recommended by the probation department were not correctly scored in light of the charges against defendant. The court further noted that probation did not deter defendant from engaging in criminal behavior. According to the court, defendant was too young to be carrying a gun, and because defendant carried a gun, other people were in danger. The court also noted that defendant "keeps getting into assaultive crimes" and that eventually "he's going to kill somebody, or somebody's going to kill him."

Although the many reasons cited by the trial court were valid concerns, the factors raised by the court were already taken into consideration when determining the sentencing guidelines range. Defendant received points for prior record variable (PRV) four, which takes into account defendant's "low severity juvenile adjudications." MCL 777.54. Defendant also received points for offense variable (OV) 13, which takes into account defendant's "continuing pattern of criminal behavior." MCL 777.43. Defendant also received points for OV19, which accounts for defendant's interference, or attempted interference, with the administration of justice. MCL 777.49. The trial court's reasoning for departing, i.e., defendant's continued criminal behavior and his threat to society, were factors already taken into consideration when determining the sentencing guidelines range. Although the court did note that probation was insufficient to deter defendant's criminal behavior, the court failed to articulate why this factor was a "substantial and compelling" reason to depart from the guidelines range. Moreover, the court failed to specify which, if any, factors were "given inadequate or disproportionate weight" when determining the sentence guidelines range. MCL 769.34(3); *Abramski, supra*, p 74. The trial court abused its discretion when it found substantial and compelling reasons to depart.

The trial court's failure to articulate the reason for its particular departure was an abuse of discretion. Defendant's recommended guidelines range was 0 to 11 months imprisonment (or, according to plaintiff, 7 to 23 months). However, the trial court sentenced defendant to a minimum of 32 months imprisonment for his convictions for carrying a concealed weapon and receiving and concealing stolen property. Our Supreme Court has found that a sentencing court does not have "unreviewable discretion to depart as far below or as far above the guideline range as the sentencing court chooses." *Babcock, supra*, p 259. But instead, the trial court must articulate on the record a substantial and compelling reason to justify the particular departure imposed. *Babcock, supra*, p 259. When the court imposed the minimum sentence of 32 months for defendant's convictions, the court failed to articulate any particular reason (aside from factors already taken into account in the guidelines) why it departed 21 months above the recommended guidelines range. For that reason, the court abused its discretion when it imposed the sentence at issue. Therefore, we must remand this matter to the trial court for resentencing. *Babcock, supra*, p 265.

Defendant's final argument is that the trial court erred when it refused to give the jury instruction regarding the weight of a police officer's testimony. We disagree. This Court reviews preserved claims of instructional error de novo. *People v Kurr*, 253 Mich App 317, 327;

654 NW2d 651 (2002). This Court also reviews jury instructions in their entirety to determine if reversal is required. *People v Moldenhauer*, 210 Mich App 158, 159; 533 NW2d 9 (1995).

Defendant argues that the trial court erred when it refused to give the jury instruction regarding a police officer's testimony at the end of the trial. We disagree. The court instructed the jury pool numerous times during jury selection to decide the case on the merits and not to give "greater weight or lesser weight to the testimony of a witness because he's a police officer or a lay witness." Before jury deliberation, the court instructed the jury that it must "decide the credibility of the witnesses" and that the prosecution and defense witnesses should be viewed the same.

Moreover, when the jury instructions are taken as a whole, the instructions sufficiently protected defendant's rights. This court has found that "the failure to give a requested instruction is error requiring reversal only if the requested instruction (1) is substantially correct, (2) was not substantially covered in the charge given to the jury, and (3) concerns an important point in the trial so that the failure to give it seriously impaired the defendant's ability to effectively present a given defense." *Moldenhauer, supra*, p 159-160. The court instructed the jury pool regarding the weight of a police officer's testimony numerous times during jury selection and the court sufficiently instructed the jury that the prosecution and defense witnesses should be viewed the same at the end of trial. Defendant's instructional claim is thus without merit because defendant has failed to show that the court committed error requiring reversal by not giving the instruction at the end of the trial.

Affirmed, but remanded for resentencing. We do not retain jurisdiction.

/s/ Karen M. Fort Hood  
/s/ Mark J. Cavanagh  
/s/ Deborah A. Servitto